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SUPREME COURT, U.S.

NO. 81-5634

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

RICKY WAYNE TISON and
RAYMOND CURTIS TISON,

Petitioners,

v.

STATE OF ARIZONA,

Respondent.

RESPONSE TO THE ORIGINAL and CONTINUED JOINT PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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TABLE OF CONTENTS

PAGE

TABLE OF CASES AND AUTHORITIES ii-iv

REASONS FOR DENYING THE WRIT:

I

THIS COURT'S DECISION IN LOCKETT v. OHIO LEAVES NO DOUBT THAT THE DEATH PENALTY CAN BE CONSTITUTIONALLY APPLIED TO A NON-TRIGGERMAN, SO LONG AS HIS DEGREE OF PARTICIPATION IN THE CRIME HAS BEEN CONSIDERED, AND PETITIONERS' INVOLVEMENT IN THE DEATHS OF THE FOUR MEMBERS OF THE LYONS FAMILY WAS SO DEEP AND GROSS THAT THEY WERE PROPERLY SENTENCED TO DEATH. 1

II

THE ARIZONA SUPREME COURT CORRECTLY CONCLUDED THAT PETITIONER RICKY TISON'S LAWYER HAD WAIVED ANY ISSUE OF THE ADMISSIBILITY OF PETITIONER'S STATEMENTS UNDER MIRANDA v. ARIZONA, AND THE STATEMENTS WERE SHOWN TO HAVE BEEN VOLUNTARILY MADE, SO THERE IS NO ISSUE REQUIRING ACTION BY THIS COURT. . . 11

A. EXISTENCE OF A WAIVER. 12

B. WAIVER STANDARD. 16

C. VOLUNTARINESS 17

III

THE SUFFICIENCY OF THE INSTRUCTIONS RESTS ON AN INTERPRETATION OF STATE LAW, SO THE QUESTION IS NOT APPROPRIATE FOR REVIEW BY THIS COURT, AND IN ANY EVENT THE CONSPIRACY INSTRUCTIONS WERE ADEQUATE. 19

IV

THIS COURT ALREADY HAVING DEALT WITH THE LIABILITY OF COCONSPIRATORS IN PINKERTON v. UNITED STATES, THERE IS NO NEED FOR FURTHER EXPLORATION OF THE ISSUE, ESPECIALLY AS THE COMPLICITY OF PETITIONERS IN EVERYTHING WHICH OCCURRED IS SO GROSS AND SO PLAIN. 20

CONCLUSION 20

CERTIFICATE OF SERVICE 21

TABLE OF CASES AND AUTHORITIES

CASES	PAGE
Bullock v. State, 391 So.2d 601 (Miss. 1980)	11
Coker v. Georgia, 433 U.S. 584 (1977)	7
Cupp v. Naughton, 414 U.S. 141 (1973)	19
Edwards v. Arizona, ___U.S.___, 68 L.Ed.2d 378 (1981)	11, 13
Enmund v. Florida, 399 So.2d 1362 (1981) cert. granted No. 81-5321	3, 4, 10
Estelle v. Williams, 425 U.S. 501 (1976)	17
Gregg v. Georgia, 428 U.S. 153 (1976)	7
Green v. Georgia, 442 U.S. 95 (1979)	7
Haynes v. Washington, 373 U.S. 503, 515-516 (1963)	18
Henry v. Mississippi, 379 U.S. 443 (1965)	16
Legare v. State, 243 Ga. 744, 257 S.E.2d 247 (1979)	10
Lockett v. Ohio, 438 U.S. 586 (1978)	1, 3, 7
Malinski v. New York, 324 U.S. 401 (1945)	17, 18
Michigan v. Mosley, 423 U.S. 96 (1975)	11
Miranda v. Arizona,	11, 12, 13, 14, 15, 16, 17
Mullaney v. Wilbur, 421 U.S. 684 (1975)	19
On Lee v. United States, 343 U.S. 747, fn. 3 (1952)	16
Picard v. Connor, 404 U.S. 270 (1971)	17
Pinkerton v. United States, 328 U.S. 640 (1946)	20
Prather v. State, 137 P.2d 249 (Okla. Cr. App. 1943)	11

TABLE OF CASES AND AUTHORITIES
(Continued)

CASES	PAGE
Rhode Island v. Innis, 446 U.S. 291 (1980)	11
State v. Andrews, 574 P.2d 709 (Utah 1977)	11
State v. Arnett, 119 Ariz. 38, 46, 579 P.2d 542, 550 (1978)	15
State v. Bishop, 118 Ariz. 263, 268, 576 P.2d 122, 127 (1978)	15
State v. Brewer, 417 N.E.2d 889 (Indiana 1981)	10, 11
State v. Cabrera, 114 Ariz. 233, 560 P.2d 417 (1977)	15
State v. Denny, 27 Ariz. App. 354, 555 P.2d 111 (1976)	15
State v. Edwards, 122 Ariz. 206, 212, 594 P.2d 72, 78 (1979)	13
State v. Gallagher, 97 Ariz. 1, 396 P.2d 241 (1964)	14
State v. Goodsoe, 107 Ariz. 367, 489 P.2d 4 (1971)	19
State v. Greenawalt, 128 Ariz. 150, 168-170, 624 P.2d 828, 846-848 (1981) cert. denied ___U.S.___, 50 U.S.L.W. 3250	19
State v. Miller, 110 Ariz. 597, 598, 522 P.2d 23, 24 (1974)	15
State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976) cert. denied 433 U.S. 915 (1977)	6
State v. Stone, 122 Ariz. 304, 594 P.2d 558 (Ct. App. 1979)	15
State v. Watson, 120 Ariz. 441, 447, 586 P.2d 1253, 1259 (1978) cert. denied 440 U.S. 924	6
State v. Winters, 27 Ariz. App. 508, 556 P.2d 809 (1976)	16
United States v. Duvall, 537 F.2d 15 (2d Cir. 1976) cert. denied 426 U.S. 950	18
Wainwright v. Sykes, 433 U.S. 72 (1977)	16
ARIZONA REVISED STATUTES ANNOTATED	
§§13-454(F)(3)(4)	10
UNITED STATES CONSTITUTION	
Fifth Amendment	12

TABLE OF CASES AND AUTHORITIES
(Continued)

CASES	PAGE
UNITED STATES CONSTITUTION	
Sixth Amendment	12
Fourteenth Amendment	17
I WHARTON'S CRIMINAL LAW AND PROCEDURE	
(Anderson ed. 1957) §97 at 194-196	20

NOTE:

Essentially identical evidence was introduced at the separate trials of the two Petitioners. Unless otherwise designated, all transcript references are to the trial of Ricky Tison.

REASONS FOR DENYING THE WRIT

I. THIS COURT'S DECISION IN LOCKETT v. OHIO LEAVES NO DOUBT THAT THE DEATH PENALTY CAN BE CONSTITUTIONALLY APPLIED TO A NON-TRIGGERMAN, SO LONG AS HIS DEGREE OF PARTICIPATION IN THE CRIME HAS BEEN CONSIDERED, AND PETITIONERS' INVOLVEMENT IN THE DEATHS OF THE FOUR MEMBERS OF THE LYONS FAMILY WAS SO DEEP AND GROSS THAT THEY WERE PROPERLY SENTENCED TO DEATH.

In approaching the death penalty issue Petitioners have set the stage with a substantially erroneous summary of the case, that "It is undisputed that they did not fire the fatal shots, intend the fatal results, or control the fatal events". (Original Petition at 15.) In fact, all three of those propositions have been heavily disputed. To begin with, the only direct "evidence" of who fired the fatal shots was from Petitioners themselves, hardly an unbiased source. Nothing would be less surprising than to discover two young murderers seeking to lay the blame on Gary Tison (who, though their father, was already dead and had been previously convicted of a murder committed in the course of an escape) and Randy Greenawalt (a convicted double murderer whom nobody would believe). The victims were killed by blasts from two shotguns, one of them a 16 gauge. A firearms expert from the F.B.I. testified that the 16 gauge shells at the death scene bore markings consistent with having been fired from a gun marked as Exhibit 24. (R.T. Vol. V at 524-525.) Exhibit 24 was a weapon Ricky Tison had left with one Charles Whittington, a gunsmith, for purposes of having it shortened, and later retrieved. (R.T. Vol. I at 112-113.) Also interesting was the presence by the death car of two expended .45 shells Exhibit 52A, (Vol. II at 206.) They were fired,to an absolute certainty, from Ricky Tison's single-action Colt revolver (Exhibit 29), which he had bought from Whittington. (Vol. V at 528.) Ricky obviously set great store by this pistol, for he took it with him when he ran half-clothed from the wrecked van. (Vol. II at 328-29, 331-33.) Though the resting place

of the slugs from the .45 is not shown in the record, the presence of the spent cartridges from Ricky's personal handgun at the crime scene is strongly suggestive of active participation in the events there. This gun is particularly important, because Ricky Tison was concerned enough to lie about it. He admitted being armed with it during the Lyons episode. (Summary of Jan. 26, 1979 statement, attached to Presentence Report, at 1.) He claimed it was never fired:

> Q. Okay. Was there any other weapon fired out there except those two shotguns?
>
> A. No. They were the only two shot.
>
> (Transcript of Brown interview at 47.)

Yet we know it was fired there, because of the expended cartridges found at the scene.

Second, Petitioners' claimed lack of intent that people should die has never been conceded, and is clearly negated by the evidence. Several examples will suffice. Both brothers indisputably cooperated in a conspiracy to break two known murderers out of prison. To do so, they utilized sawed-off shotguns and a pistol with a silencer; a silencer has no purpose other than to make killing easier by concealing the noise generated by shooting. Ricky spoke to his brother after their capture about a .45 automatic: "He said he lost the pistol when the van went out of control and he didn't get a chance to use it." (R.T. Vol. III at 484.) A psychological report prepared in anticipation of sentencing indicates that Ricky went into the affair expecting that a "shoot-out" would be necessary eventually. (MacDonald report, attached to Presentence Report, at 5-6.) The situation was similar with Raymond Tison. He stated to the Probation Officer that the guns used in the prison break were loaded, and that he realized people might be killed; he would even have been willing to personally kill in a "very close life or death" situation. (Presentence Report at 11.) Thus, even if they did not speci-

fically plot to do away with the Lyons family, both Petitioners were intent from the outset on killing people, if that seemed necessary for their purposes.

Third, it staggers the imagination to see it claimed that Petitioners did not control the fatal events. The murders would never have taken place had they not engineered the escape. More directly, even accepting their self-serving version of events, both Petitioners were in a position to influence the situation. Ricky Tison admitted that his father had specifically told him, before doing anything, that he was "really thinking" about killing the helpless, unarmed, isolated family, and that although he was himself heavily armed, he did absolutely nothing to deter or dissuade his father from doing it. (Transcript of Brown interview, Feb. 1, 1979, at 33.) Raymond Tison made a similar admission. (Interview, Jan. 26, 1979.)

Thus, there was substantial evidence of Petitioners' deep participation in the events which were the predicate to the killings, without convincing rebuttal, their murderous intent, and their influence over the whole situation. Any fair reading of the opinions (Exhibits A and B to the Petition) shows that the Arizona Supreme Court did not accept Petitioners' position on these matters, but rather held that even if Petitioners were right, it would not relieve them of culpability. These factors are important because they demonstrate significant distinctions between thise case and the two cases Petitioners primarily rely on, Lockett v. Ohio, 438 U.S. 586 (1978), and Enmund v. Florida, 399 So.2d 1362 (1981), cert. granted, No. 81-5321. Lockett involved an accidental killing in the course of a robbery, out of the presence of the defendant, (438 U.S. at 590), so it factually is not comparable to the carefully crafted conspiracy and prison break presented here. Moreover, the whole point in Lockett was that Ohio did not permit minimal participation to be treated as mitigation; Arizona has specifically allowed such consideration since 1973, and Petitioners were both given the

benefit of it. Enmund is also different, in that there was no evidence of the sort of preconcert and willingness to see death occur which was obvious in this case, Enmund apparently was not present when the killings occurred, and Enmund's cohorts were not identified as being convicted murderers whom he had brokenout of prison. The prior history of the persons a defendant associates himself with is of great importance; while Petitioners indicate their willingness to explore "the Anglo-American history of the felony murder and aiding and abetting rules" (Petition at 16), far older precedent has resolved the question of their culpability against them on precisely this basis:

> "And if an ox gores a man or a woman to death, the ox shall surely be stoned and its flesh shall not be eaten; but the owner of the ox shall go unpunished.
>
> "If, however, an ox was previously in the habit of goring, and its owner has been warned, yet he does not confine it, and it kills a man or a woman, the ox shall be stoned and its owner also shall be put to death.
>
> Exodus 21:28-29.

Having intentionally set loose murderers, Petitioners may not be heard to claim they are guiltless when more deaths are perpetrated.

Turning from essentially factual considerations to legal arguments, we see that Petitioners have raised several. First, they claim that they were not given individualized sentencing consideration, because the judge simply treated them like "the actual killers". (Petition at 16-17.) As we have already noted, there is some basis for believing that Petitioners are the "actual killers", but in any event the trial judge did given them individualized consideration. The result of that individualized consideration was a finding of involvement so deep as to warrant punishment identical to that of the "actual" triggerman (if that was someone else). The trial judge's findings include the following:

3. Neither defendant's participation was relatively minor. Although each of the defendants has stated the murders were actually committed by Gary Tison and Randy Greenawalt, the participation of each in the crimes giving rise to the application of the felony murder rule in this case was very substantial. Even accepting as true their statements of who actually fired the fatal shots, it cannot be said that their participation was relatively minor. By their own statements their participation up to the moment of the firing of the fatal shots was substantially the same as that of Randy Greenawalt and Gary Tison. At the moment of the firing their participation may not have equalled that of Randy Greenawalt and Gary Tison, but their standing and watching them while armed themselves cannot be characterized as relatively minor participation.

4. Each defendant could reasonably have foreseen that his conduct in the course of the commission of the offenses for which he was convicted would cause or create a grave risk of causing death to another person.

There are mitigating circumstances present. They are:

1. The youth of the defendants, Ricky being 20 years of age and Raymond being 19 years of age.

2. The defendants have no prior felony convictions and their criminal activity before July 30, 1978 was very minimal.

3. They have been convicted of four murders under the felony murder instructions.

* * *

Number 7. In determining what punishment should be imposed for your convictions of murder of John F. Lyons, Donnelda Lyons, Christopher Lyons and Teresa Jo Marie Tyson, this Court has weighed the aggravating circumstances and the mitigating circumstances set forth in its special verdict. This Court finds that there are no mitigating circumstances sufficiently substantial to call for leniency. Therefore each of you is sentenced to death on each of the murders of which you have been found guilty...

(Exhibit C to the Original Petition at pp. 63a-64a, 69a.)

Petitioners were given all the individualized consideration to which they were entitled.

Next, Petitioners suggest that "the Constitution requires the State to bear the burden of establishing that

the defendant's role in the crime was sufficiently great to warrant the death penalty". (Petition at 17.) Arizona has never contended otherwise, but what Petitioners fail to understand is that that burden is met once even one of the statutory aggravating circumstances is proved. Absent substantial mitigation, one aggravating circumstance will provide the difference between the charged crime and the "norm" of murders so that death may appropriately be imposed. See, e.g., State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied 433 U.S. 915 (1977). What Petitioners are really complaining of is the rule that it is up to the defense to provide the evidence of mitigation, which may offset the aggravating circumstance so that the death penalty is not appropriate. The Arizona Supreme Court, relying on a decision of this Court, has repeatedly rejected the argument Petitioners now raise. See, e.g., State v. Watson, 120 Ariz. 441, 447, 586 P.2d 1253, 1259 (1978), cert. denied 440 U.S. 924:

> When the issue of guilt is settled and only the question of punishment remains, due process is not offended by requiring the already guilty defendant to carry the burden of showing why he should receive leniency. This is not contrary to the due process requirement that the State has the burden of proof as to guilt of the defendant. In discussing affirmative defenses when sanity was a question, the United States Supreme Court stated:
>
> "Among other things, it is 'normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental'. (citations omitted)" Patterson v. New York, 432 U.S. 197, 201-02, 97 S.Ct. 2319, 2322 53 L.Ed 2d 281, 286-87 (1977).
>
> To require the State to negate evey mitigating circumstance would place an impermissible burden on the State. We do not believe it offends due process to require the defendant to show such mitigating circumstances.

Finally, Petitioners raise the question of the "proportionality" of the death penalty for a crime where guilt is established by means of some form of vicarious responsibility rule. Most of the cases they cite are not even relevent. Coker v. Georgia, 433 U.S. 584 (1977) involved the death penalty for rape, not homicide. In Gregg v. Georgia, 428 U.S. 153 (1976) the defendant's direct causation of the death was clear, so the felony murder question was not addressed, and Green v. Georgia, 442 U.S. 95 (1979), was only a question of evidence admissibility, not what effect that evidence (supposedly exculpatory statements by the "real" perpetrator) should have had. The only case from this Court directly examining the "proportionality" concept is Lockett v. Ohio, supra, and the various decisions in that case indicate that Petitioners' death sentences are not constitutionally "disproportionate".

It is true that Justice White held in his dissent that death was a disproportionately severe punishment "without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624. In doing so he stood alone. Justice Marshall continued to adhere to his view that the death penalty is always constitutionally prohibited. 438 U.S. at 619. Presumably he would be joined in this by Justice Brennan, who did not participate in the decision.

A six member majority of the court refused to hold that execution could never be imposed for felony murder. Justice Rehnquist flatly rejected the results of Justice White's proportionality analysis:

> As my Brother WHITE concedes, approximately half of the States 'have not legislatively foreclosed the possibility of imposing the death penalty upon one who did not intend to cause death.' . . .Centuries of common-law doctrine establishing the felony-murder doctrine,

> dealing with the relationship between aiders and abettors and principals would have to be rejected to adopt this view. Just as surely as many thoughtful moralists and penologists would reject the Biblical notion of 'an eye for an eye, a tooth for a tooth,' as a guide for minimum sentencing, there is nothing in the prohibition against cruel and unusual punishments contained in the Eighth Amendment which sets that injunction as a limitation on the maximum sentence which society may impose.
>
> 438 U.S. at 635-36.

The plurality opinion, authored by Chief Justice Burger and joined in by Justices Stewart, Powell, and Stevens, emphasized that the felony-murder doctrine itself was constitutionally inoffensive:

> That states have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony murder statutes is beyond constitutional challenge.
>
> 438 U.S. at 602.

They did hold that degree of participation in the crime had to be considered in assessing punishment, but nowhere in the opinion is there any suggestion that death may not be appropriate, even for a felony-murder, if the mitigating effect of minimal participation or lack of specific murderous intent is out-weighed by sufficiently cogent aggravating factors.

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.
>
> 438 U.S.at 604.
> (emphasis original, footnotes omitted).
>
> [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense

> proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.
>
> 438 U.S. at 605. (Emphasis added.)

Justice Blackmun likewise rejected any absolute prohibition on the use of the death penalty based upon proportionality analysis:

> The Ohio capital statute, together with that State's aiding and abetting statute, and its statutory definition of 'purposefulness' as including reckless endangerment, allow for a particularly harsh application of the death penalty to any defendant who has aided or abetted the commission of an armed robbery in the course of which a person is killed, even though accidentally. It might be that to inflict the death penalty in some such situations would skirt the limits of the Eighth Amendment proscription, incorporated in the Fourteenth Amendment, against gross disproportionality, but I doubt that the Court, in regard to murder, could easily define a convincing bright-line rule such as was used in regard to rape, Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 282 (1977), to make workable a disproportionality approach.
>
> 431 U.S. at 613-14.
> (emphasis added, footnotes omitted).

Instead, he too would have the circumstances of the crime weighed in mitigation, the outcome to be determined by the cumulative impact of all the factors, both mitigating and aggravating, relevant to sentencing:

> The more manageable alternative, in my view, is to follow a proceduralist tack, and require, as Ohio does not, in the case of a nontriggerman such as Lockett, that the sentencing authority have discretion to consider the degree of the defendant's participation in the acts leading to the homicide and the character of the defendant's mens rea. That approach does not interfere with the State's individual statutory categories for assessing legal liability but merely requires that the sentencing authority be permitted to weigh any available evidence, adduced at trial or at the sentencing hearing, concerning

> the defendant's degree of participation in the homicide and the nature of his mens rea in regard to the commission of the homicidal act. A defendant would be permitted to adduce evidence, if any be available, that he had little or no reason to anticipate that a gun would be fired, or that he played only a minor part in the course of events leading to the use of fatal force.
>
> 438 U.S. at 615-16.

It therefore appears that while degree of participation and other circumstances of the crime must be taken into account as mitigating factors, the existence of such factors does not dictate that capital punishment may never be imposed. Such circumstances must simply be added to the sentencing calculus, the outcome being determined by the impact of all sanction-relevant variables. This is precisely what has been required in Arizona since enactment of the current capital punishment scheme. Ariz. Rev. Stat. Ann. §§13-454 (F)(3) and (4), which governed the sentences in this case, provided that the following must be considered as mitigating circumstances:

> 3. He was a principal, under §13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
>
> 4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

Petitioners were given the benefit of these provisions, and the trial court also took cognizance that the convictions had been obtained under felony-murder instructions. Thus there can be no question that Petitioners were given every consideration they were entitled to.

A significant number of state courts have concluded that death is not a disproportionate penalty where one is deeply involved in a murder, even if he is not the trigger-man. Besides this case and Enmund v. Florida, see Legare v. State, 243 Ga. 744, 257 S.E.2d 247 (1979); State v. Brewer,

417 N.E.2d 889 (Indiana 1981); Bullock v. State, 391 So.2d 601 (Miss. 1980); Prather v. State, 137 P.2d 249 (Okla. Cr. App. 1943); State v. Andrews, 574 P.2d 709 (Utah 1977). This Court should concur with these courts, and deny the writ in the present case.

II. THE ARIZONA SUPREME COURT CORRECTLY CONCLUDED THAT PETITIONER RICKY TISON'S LAWYER HAD WAIVED ANY ISSUE OF THE ADMISSIBILITY OF PETITIONER'S STATEMENTS UNDER MIRANDA v. ARIZONA, AND THE STATEMENTS WERE SHOWN TO HAVE BEEN VOLUNTARILY MADE, SO THERE IS NO ISSUE REQUIRING ACTION BY THIS COURT.

Petitioner Ricky Tison next raises questions about the admission of certain incriminating statements made by him. He begins by flatly asserting that these statements were bad, because in violation of Edwards v. Arizona, ___ U.S. ___, 68 L.Ed.2d 378 (1981) and Rhode Island v. Innis, 446 U.S. 291 (1980). (Continued Petition at 17.) This contention is not admitted by Respondent; quite aside from the fact that the events and trial in this case long preceded both those decisions, so that they may not even be chronologically applicable, the facts are much closer to those in Michigan v. Mosley, 423 U.S. 96 (1975). There was a total of three statements given, but virtually everything elicited in the two earlier statements (which occurred out in the desert at the scene of the capture) was also included in the later statement, given in the jail to Lt. Brawley. The Brawley statement is a classic Mosley situation, separated substantially by both time and distance from the original questioning, conducted by a different person from a different agency, and preceded by a completely renewed advisement of rights. Therefore, even if Miranda applied, it was complied with, at least in the Brawley statement, and the earlier statements (even if improper in some respect) were superfluous, and harmless error at worst. It is submitted, however, that

the Arizona Supreme Court properly refused to pass on the claimed Miranda violations because they were, indeed, waived, and it is therefore unnecessary for this Court to tediously dissect the facts on the question.

A. Existence of a waiver. Petitioner has admitted that he "presented no written motion or oral argument at the suppression hearing which specifically mentioned the Fifth and Sixth Amendments or Miranda v. Arizona." (Continued Petition at 17.) However, to understand how clearly the defense counsel was asserting pure voluntariness and nothing more, it is essential to read his actual argument, which is reproduced as pages 165a-167a of Exhibit L, attached to the Continued Petition. He began as follows:

> MR. BEERS: Your Honor I move to suppress all three of the statements that Ricky allegedly made.
>
> The basis of my motion is that the statements were not voluntary. I am not alleging that anybody -- I have no further witnesses, I will go on into my argument.
>
> I am not alleging that anybody held a gun to Ricky's head and said "talk, or else," but I am claiming that the totality of circumstances of which the statements were taken were so intimidating that no normal person would have had enough nerve to invoke his right to remain silent.
>
> (Exhibit L, p. 165a; emphasis added.)

He ends on a similar note:

> I do know that under the law when all the circumstances are looked at, the statement is not really voluntary, and it should be suppressed, and I think that is the case with all three of Ricky's statements.
>
> (Id. at 167a; emphasis added.)

This line of argument plainly demonstrates that the defense counsel understood what is shown below, that the Arizona courts have consistently distinguished between compliance with Miranda and the broader concept of voluntariness, and that he framed his argument accordingly. Nowhere in his discussion does he so much as mention Miranda

or the right to counsel. On the contrary, he raises factors which are indisputably outside the realm of Miranda, but which do bear on the traditional concept of voluntariness: numerous police being around, the defendants' clothes being cut off them, their being held nude out in the desert for some time, uncertainty regarding the status of Donnie Tison, etc. Even in discussing the matter of appellant's refusal to sign a rights waiver form the lawyer did not advert to typical Miranda questions like the resumption of questioning after a rights invocation; instead, he argued that the refusal to sign indicated that the statement given was "not really voluntary." It is true that the prosecutor briefly mentioned Miranda in his responsive argument (Exhibit L, pp. 168a, 169a) but the overwhelming bulk of the argument was oriented toward voluntariness generally. Likewise, the trial judge mentioned his belief that both Petitioners had understood and waived their rights, but only as an afterthought to his finding that the statements were "freely and voluntarily made". (Exhibit L. at p. 170a.)

Petitioner would ascribe all of this not to a careful focusing on what the defense counsel really believed to be the state of the facts and a calculated decision as to what he could reasonably argue, but rather to a general confusion in Arizona law about the distinction between Miranda on one hand and "voluntariness" on the other hand. In support of this idea he particularly points to this Court's reversal of the Arizona Supreme Court in Edwards v. Arizona, supra. It is submitted that this Court perceived confusion in Edwards that was not actually there; the Arizona Supreme Court pointed out in State v. Edwards, 122 Ariz. 206, 212, 594 P.2d 72, 78 (1979), that "voluntariness of a confession" was meant to include "the totality of the circumstances", including "whether the defendant's action is knowing and intelligent

and whether his will has been overborne". "Knowing, intelligent, and voluntary" is Miranda phraseology. Nonetheless, this Court treated the case as if voluntariness in the broad sense of the overbearing of the defendant's will was the only factor considered, and reversed. The truth is that Arizona has always distinguished between Miranda compliance and "voluntariness", but the distinction is blurred if the reader of the caselaw fails to recognize that "voluntary" means different things in different contexts. Even before Miranda came along a defendant's statements had to be voluntary to be admissible, in the sense of not being the result of threats, promises, or duress. See, e.g., Kermeen v. State, 17 Ariz. 263, 151 P.738 (1915); State v. Gallagher, 97 Ariz. 1, 396 P.2d 241 (1964). Miranda is based on the theory that custodial interrogation is inherently coercive, so that decision rather artificially added another facet to voluntariness -- the warnings spelled out in Miranda had to be given or the statements would be excluded as "involuntary", regardless of whether there had been any actual threats, promises, etc. Another side of Miranda is that, even if the warnings were properly given (so as to remove the presumption of involuntariness), defendants would sometimes invoke the Miranda rights, and then subsequently make a statement. The law, of course, demands that the waiver of such invoked rights be shown to be knowing, intelligent and voluntary, so yet another variant on the term "voluntary" developed. Thus, "voluntary" has at least two different discernible usages -- in the limited and rather artificial context of Miranda (relating to either the initial warnings or a subsequent waiver), and in the broader context of any sort of improper influence (regardless of whether the warnings have been given). The Arizona courts have consistently maintained the distinction between voluntariness in its broad sense and the

artificial concept of voluntariness set up in Miranda. Examples are:

1. State v. Arnett, 119 Ariz. 38, 46, 579 P.2d 542, 550 (1978) - "Miranda v. Arizona, supra, did not displace the standards of 'voluntariness' established by case law before that decision; whether a confession is voluntary depends on the facts of each case; and compliance with the Miranda decision is only one factor to be considered."

2. State v. Bishop, 118 Ariz. 263, 268, 576 P.2d 122, 127 (1978) - compliance with Miranda and absence of threats, promises, long interrogation, etc. listed separately as factors showing voluntariness.

3. State v. Cabrera, 114 Ariz. 233, 560 P.2d 417 (1977) - statements to private persons must still be free of coercion to be admissible, even though Miranda not applicable.

4. State v. Miller, 110 Ariz. 597, 598, 522 P.2d 23, 24 (1974) - court dealt with appellant's contention that "even if he were properly given the Miranda warnings, the confession was involuntary..."

5. State v. Stone, 122 Ariz. 304, 594 P.2d 558 (Ct. App. 1979) - court need not instruct jury on Miranda in giving them voluntariness issue.

6. State v. Denny, 27 Ariz. App. 354, 555 P.2d 111 (1976) - though Miranda was "scrupulously observed", confession improperly admitted because obtained by trick.

In sum, there is no reason to believe that this was anything other than a knowledgeable decision by counsel to pursue the voluntariness line of argument and waive the other approaches. It is therefore fair to hold Petitioner to his choice of argument and to preclude consideration of objections not clearly raised with the trial court. This is not the first time an Arizona appellate court has refused

to consider an objection to a confession not raised in the trial court. See State v. Winters, 27 Ariz.App. 508, 556 P.2d 809 (1976). That the Attorney General argued the Miranda issues (Continued Petition at 18) means no more than that he responded to the issues as framed first by Petitioner in the appeal and in doing so overlooked the waiver; such appellate level inadvertence cannot transform trial court waiver into a non-waiver. The bottom line is that the trial judge was never put on notice that a detailed Miranda analysis was expected, so none was done, and Petitioner waived the issue.

B. Waiver standard. Petitioner further suggests that the Court should take this case up as an opportunity to establish what kind of conduct is necessary to establish a waiver. It is submitted that such a standard has already been set, and that the record here contains nothing calling out for renewed consideration by this Court. There can be no doubt that the Arizona procedural rule requiring specificity of objections meets legitimate state interests. Its functions are similar to, and complemtary to, the contemporaneous objection rule endorsed by this Court in Henry v. Mississippi, 379 U.S. 443 (1965) -- unless the trial judge understands what the objection is, he cannot respond to it appropriately, and the whole reason for raising objections will be frustrated. Indeed, this Court itself subscribed to the specific objection rule in On Lee v. United States, 343 U.S. 747, fn. 3 (1952). Petitioner has presented no explanation whatever for the failure to raise objection to the admission of his statements on Miranda grounds, let alone "exceptional circumstances", so he cannot complain there was error. Cf. Wainwright v. Sykes, 433 U.S. 72 (1977); Henry v. Mississippi, supra. The record suggests there was a knowing waiver, for several reasons. The lawyer was, after all, competent enough

to make a suppression motion. Further, counsel for codefendant Greenawalt, who had undergone essentially similar treatment, had filed a suppression motion specifically based on Miranda less than two months before this motion was heard (Item 32, State Court Record on Appeal), so Petitioner's counsel (who attended the hearing on it) was certainly aware of Miranda's potential applicability. Even after the prosecutor mentioned Miranda briefly in responding to the argument of Petitioner's counsel, the defense lawyer had nothing to say about it. (Exhibit L to the Continued Petition at 168a-170a.)

Under facts like this a knowing waiver must be found. Cf. Estelle v. Williams, 425 U.S. 501 (1976). While Petitioner seems to find it surprising that a failure to state a particular case or numbered amendment will suffice to preclude relief, such action is in accordance with this Court's own actions. See, e.g., Picard v. Connor, 404 U.S. 270 (1971), where relief was denied under the Equal Protection Clause because a litigant, in invoking the Fourteenth Amendment, argued and relied at the state court level only on the Due Process Clause. As we have seen, it is one thing to say that a statement is involuntary, but it is something altogether different to say that it was obtained in violation of Miranda. Petitioner's counsel knowingly relied only on voluntariness, so he merits no relief.

C. Voluntariness. Finally, Petitioner asks this Court to determine whether his statements were indeed voluntary. (Continued Petition at 17-20.) While the cases he cites indicate that questioning of a prisoner while he is stripped is one factor to be considered, none of them establishes a per se rule equating nudity with involuntariness. On the contrary, one of his cases, Malinski v. New York, 324 U.S. 401 (1945) emphasizes that voluntariness is to be determined by examining

"all the attendant circumstances". 324 U.S. at 404. Malinski is particularly instructive in that because the removal of the suspect's clothing was for a legitimate purpose, to examine for bullet wounds, and he was later given a covering, the stripping was actually accorded little weight. See also United States v. Duvall, 537 F.2d 15 (2d Cir. 1976), cert. denied 426 U.S. 950. The situation was similar with Petitioner. His clothing was initially removed as part of a search, was retained because it had been cut to get it off and with the legitimate object of preserving it as evidence, and he was given a blanket to cover himself with before being questioned. (Exhibit L at 136a, 140a, 144a-145a.) The Malinski confession was held involuntary because it "was the product of fear" of being beaten (324 U.S. at 407), and no similar fear has been proved in Petitioner's case.

The details of the circumstances pertaining to Petitioner's statements were presented to the trial court, which found the statements admissible, and that conclusion was upheld after exhaustive examination by the Arizona Supreme Court. (Exhibit A to the Original Petition at 13a-17a.) This Court has previously held that substantial deference will be given to the findings of the trial court, even on the ultimate question of voluntariness. Haynes v. Washington, 373 U.S. 503, 515-516 (1963). This being so, the only reasoned conclusion available is that Petitioner's statements were voluntary and were properly admitted, so no action by this Court is necessary.

III. THE SUFFICIENCY OF THE INSTRUCTIONS RESTS ON AN INTERPRETATION OF STATE LAW, SO THE QUESTION IS NOT APPROPRIATE FOR REVIEW BY THIS COURT, AND IN ANY EVENT THE CONSPIRACY INSTRUCTIONS WERE ADEQUATE.

Petitioners next complain that the Arizona Supreme Court failed to review the correctness of certain instructions given concerning conspiracy. That is not altogether correct. Though the Arizona court declined to go into whether or not the four formal elements of the crime of conspiracy had been enunciated, it did examine them to determine that they conveyed the substance of the Arizona statute which imposes criminal responsibility on all persons "concerned in" the commission of an offense. (Exhibit A to the Original Petition, pp. 17a-18a; see also State v. Greenawalt, 128 Ariz. 150, 168-170, 624 P.2d 828, 846-848 (1981), cert. denied ___U.S.___, 50 U.S.L.W. 3250, in which the same issue was discussed at length in the context of the trial of Petitioners' codefendant.) The highest court of a state is, of course, the ultimate authority on the meaning and application of state statutes. Mullaney v. Wilbur, 421 U.S. 684 (1975). Petitioners are, therefore, really complaining about a state law matter, not a true federal question, and hence are raising matters outside this Court's authority.

It is plain,moreover, that if a full-scale analysis of the instructions is done, they would be fully adequate to cover even a separate formal charge of conspiracy. It is well established in both Federal and Arizona jurisprudence that instructions must be evaluated in their totality. Cupp v. Naughton, 414 U.S. 141 (1973); State v. Goodsoe, 107 Ariz. 367, 489 P.2d 4 (1971). The instructions on conspiracy cover portions of three pages. (Exhibit M at 177a-179a.) The instruction objected to at trial (Number 17) makes up only the first few lines of these instructions, and includes two of the four elements the Petition lists, agreement and

an illegal objective. (177a, at lines 26-28.) The necessity for a plan is touched upon at 178a, lines 8-12. The term "overt act" is not used in the instructions, but the concept is plainly conveyed in the discussion of the need for someone to "act or participate" in furtherance of the conspiracy (178a at lines 8-26), and the mention that the acts of one conspirator bind the others (179a at lines 10-22). All the elements being covered, the instructions were sufficient, and there is obviously no ground for review by this Court.

IV. THIS COURT ALREADY HAVING DEALT WITH THE LIABILITY OF COCONSPIRATORS IN PINKERTON v. UNITED STATES, THERE IS NO NEED FOR FURTHER EXPLORATION OF THE ISSUE, ESPECIALLY AS THE COMPLICITY OF PETITIONERS IN EVERYTHING WHICH OCCURRED IS SO GROSS AND SO PLAIN.

Petitioners desire for this Court to deal with the concept of imputed criminal responsibility; it has already done so, finding it altogether permissible for a conspirator to be held accountable for substantive crimes committed in the course of the conspiracy by his coconspirators. Pinkerton v. United States, 328 U.S. 640 (1946); see also I WHARTON'S CRIMINAL LAW AND PROCEDURE (Anderson ed. 1957) §97 at 194-196. In any event, even if some restrictions were to be applied, they could not reasonably benefit Petitioners, who were inextricably involved in every aspect of the criminal scheme here. This case is no vehicle for modification of the Pinkerton rule.

CONCLUSION

Petitioners' trials were fundamentally fair in all respects, and their death penalties are both legal and proportionate to the wickedness of their conduct. This Court should therefore decline to review this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Pima)

BRUCE M. FERG being first duly sworn on oath deposes and says: He is an Assistant Attorney General for the State of Arizona and as such did cause to be deposited in the U.S. Mail, postage prepaid, two (2) copies of the foregoing to

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Ricky Tison

Raymond Curtis Tison

Bruce M. Ferg
BRUCE M. FERG

SUBSCRIBED AND SWORN to before me this 4th day of December, 1981.

Annette C. Atkins
Notary Public

My Commission Expires:

June 4, 1985